In The

Supreme Court of the United States

October Term, 1989

CITY OF BURLINGTON, and ROBERT WHALEN, Operations Manager of Parks & Recreation Department,

Petitioners,

v.

MARK A. KAPLAN, ESQ., RABBI JAMES S. GLAZIER, and REVEREND ROBERT E. SENGHAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the semi-permanent display of a solitary, unattended religious symbol on public forum property closely associated with the seat of a municipal government violates the establishment clause of the First Amendment?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Mark A. Kaplan, Esq., Rabbi James S. Glazier, and Reverend Robert E. Senghas, respectfully request that this Court deny the instant petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit. *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989). Petitioners' App. at 1-25. That judgment reversed and remanded the

decision of the United States District Court for the District of Vermont. *Kaplan v. City of Burlington*, 700 F. Supp. 1315 (D. Vt. 1988). Petitioners' App. 28-45. The Second Circuit held that an unattended, solitary display of a religious symbol on public forum property closely associated with a seat of municipal government violates the establishment clause of the First Amendment. *Kaplan*, 891 F.2d at 1028-1030. Petitioners' App. at 11-16.

STATEMENT OF THE CASE

Except as otherwise noted below, the Respondents adopt the statement of the case of the Petitioners.

The parties stipulated that a menorah is a religious symbol of the Jewish faith and is recognized as such by the general public. The menorah in question, which is sixteen feet high and twelve feet wide, was erected and maintained on municipally controlled property some 60 feet from the westerly steps of City Hall; from the general direction of the westerly public street it "appeared superimposed upon City Hall." City Hall is the seat of Burlington City Government. *Id.* at 1025-30. Petitioners' App. at 4-14. It contains, among other things, the office of the Mayor of the City of Burlington, the auditorium in which meetings of the Board of Aldermen are conducted and the offices of many departments of City government, including the City Clerk's and City Attorneys' offices. Stipulation of Facts, No. 31. City Hall is an official symbol of Burlington City government. A drawing of City Hall forms the substance of the seal of the City. Defendants' Exhibit 9. City Hall Park is one of 19 city parks located in

the City of Burlington. No other park is closely associated with the seat of Burlington City Government. *See Kaplan*, 891 F.2d at 1025-26. Petitioners' App. at 4.

Contrary to the City's assertion that the menorah bore a disclaimer indicating that it was sponsored by Lubavitch of Vermont "rather than the City," Petition at 4, the sign associated with the menorah bore only words of endorsement:

HAPPY
CHANUKAH

SPONSORED BY:
LUBAVITCH OF VERMONT

Constructed by – Blackthorne Forge
Material – Queen City Steel

No language appeared on the sign denying the City's sponsorship of the menorah. Plaintiffs' Exhibits H-7 and H-8.

During the years in question the menorah was the centerpiece of a religious lighting ceremony attended by many people. Except for this short religious dedication service, the menorah remained a stark, unattended religious artifact superimposed on City Hall throughout the Chanukah season. Its sign was not illuminated at night. The sign was visible only from a generally westerly direction. *Kaplan*, 891 F.2d 1026, 1029. Petitioners' App. at 6-7, 12-13. Although the sign was visible and the words "Happy Chanukah" were readable from the westerly street, it is fair to infer that from that distance the remaining words on the sign were illegible. Stipulation of Facts, Nos. 73-74.

Also contrary to the Petitioners' assertion, the parties did not stipulate "that from 1982 through 1988 permits for City Hall Park were issued to groups engaging in religious activities." Petition at 4. In fact, the parties stipulated that "[r]eview of all Park Special Use Permits relating to City Hall Park from 1982 through 1988 reveal[s] 13 permits in addition to [the permits at issue here], which *suggest* the use of the Park involving religious activity." Stipulation of Facts, No. 3 (emphasis added). In fact, in most of the 13 instances, the use of the Park by religious groups was *not* for religious purposes.[1] All of these uses have in common a transient, populated nature. None involved the use of City Hall Park for a lengthy period. Other than the menorah in question, no permits have been issued for the unattended display of any religious symbol in the Park. *Kaplan*, 891 F.2d at 1029. Petitioners' App. at 14.

The display of the menorah caused sectarian dissention in the City of Burlington. A number of City agencies received telephone calls about the menorah, some in support and some in opposition. Some unfortunate calls suggested that because the Governor and the Mayor were

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[1] Only four of the permits involve unambiguous religious uses of the park. The other nine permits, while containing some indicia of religious involvement, such as church sponsorship, appear to be of a primarily secular nature. For example, one permit was issued to the Northern Vermont Christian Action Council for an anti-abortion march. A second was issued to the Community Church of Island Pond for teaching Israeli folk dancing. A third was issued to the Unitarian Universalist Society for a "bike for peace rally" involving a joint bike trip by United States and Soviet citizens. Plaintiffs' Exhibits J-1 through J-14-1.

both Jewish, the City might be more inclined to allow a menorah than a creche. Stipulation of Facts, Nos. 78-80. The City Attorney called a news conference to disavow responsibility for the display of the menorah. He acknowledged that "last year we had to say that [the menorah was not sponsored by the City] so often that it became ours in some people's minds." *Kaplan*, 891 F.2d at 1030. Petitioners' App. at 15.

The plain objective of the display of the menorah in City Hall Park is religious. *Id.* at 1026. Petitioners' App. at 6. The entity which sought to place the display in City Hall Park is the Vermont Organization for Jewish Education-Lubavitch, a Vermont corporation organized for the purpose of promoting and disseminating Jewish education. The Vermont Organization for Jewish Education-Lubavitch is associated with a larger group of Orthodox Jews known as the Chabad Lubavitch. The Lubavitch movement is a Hasidic sect that seeks to reawaken interest among Jews in traditional Judaism. The local Lubavitch Rabbi, Yitzchok Raskin, wishes to display the menorah on public property, as distinct from private property. He has acknowledged that "the Lubavitch movement advocate[s] the display of menorahs all over the country." Rabbi Raskin has personally participated in efforts to place menorahs on public property in Miami Beach, Florida and New York City, New York. *Id.* Stipulation of Facts, at 41B (a)-(e).

Other locations are available for the display. Respondent Glazier offered the grounds of the synagogue where he officiates, which is private property, as a site for the display of the menorah. The synagogue is located on a heavily traveled highway. Respondent Senghas made a

similar offer of the front lawn of the Unitarian Church. The church is located in downtown Burlington, approximately three tenths of a mile from City Hall Park. Lubavitch of Vermont is unwilling to display its menorah at either the synagogue or the Church. Stipulation of Facts, Nos. 3A, 136-137.

SUMMARY OF ARGUMENT

The Court of Appeals' decision correctly balanced this Court's establishment clause and public forum decisions. *Compare County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989) *with Widmar v. Vincent*, 454 U.S. 263 (1981). The public display of an unattended, solitary, semi-permanent religious symbol at the seat of City government created the appearance of City endorsement of religion. The status of the location as a public forum was a factor taken into account in determining that the context suggested endorsement. Observance of the establishment clause is a compelling interest justifying narrow restrictions on religious displays.

Chabad v. City of Pittsburgh, 110 S. Ct. 708 (1989), is not to the contrary.

The decision below is closely tied to the particular context of this display. No sharp conflict of constitutional principles is presented.

Allegheny is a very recent decision; the lower courts have not yet had an opportunity to apply it in more than a few instances. There is no conflict in the circuits. This

Court should allow the issues to mature before reentering the field.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. The Court of Appeals correctly applied the holdings of *Allegheny* and *Widmar* to these facts.

The Court of Appeals carefully harmonized this Court's establishment and public forum standards. It held that the public display of an unattended, solitary, semi-permanent religious symbol *at this particular location* created the appearance of an endorsement of religion by the City of Burlington. Contrary to the Petitioners' suggestion, Petition at 7, the court recognized that *Allegheny* did not turn on the public forum doctrine. *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989). Petitioners' App. at 1, 14. The Court did not ignore the public forum issue; instead, it looked to, and followed the standard articulated in *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). *Kaplan*, 891 F.2d at 1029-30. Petitioners' App. at 13-16. It noted, as has this Court, that the identification of a public forum is the beginning not the end of the analysis. *Id. See Boos v. Barry*, 108 S. Ct. 1157 (1988). *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (symbolic expression in Lafayette Park and the Mall regulated).

The Court of Appeals correctly applied *Widmar* to the present facts. In *Widmar*, the university had already made its facilities available to a broad range of student groups. *Id.* at 277. Here the City had not "created a forum in City

Hall Park open to the unattended, solitary display of religious symbols." *Kaplan*, 891 F.2d at 1029. Petitioners' App. at 13-14. The court correctly found that observance of the establishment clause is a compelling governmental interest justifying narrow restrictions on certain displays in a public forum. *Id.* at 1030. Petitioners' App. at 15-16; *see Widmar*, 454 U.S. at 271 ("We agree that the interest of the [government] in complying with its constitutional obligations may be characterized as compelling.").[2] The court also found that a prohibition limited to displays of unattended, solitary religious symbols on public property would be narrowly tailored to serve the City's interest since it would allow the continued use of City Hall Park for all other uses, including transient, populated religious uses. *Kaplan*, 891 F.2d at 1030. Petitioners' App. at 16.

Clearly, the establishment clause, "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *Allegheny*, 109 S. Ct. at 3101 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). Thus "the existence of a public forum is simply a factor to be taken into account in determining whether the context of the display

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[2] Justice White suggested in his *Widmar* dissent that religious speech may be different from other varieties of protected speech in certain public forum situations. Otherwise, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." 454 U.S. at 284 (White, J., dissenting).

suggests governmental endorsement." *Kaplan*, 891 F.2d at 1029. Petitioners' App. at 14.[3]

The court's finding of endorsement was entirely consistent with this Court's holding in *Allegheny*.[4] There, a majority of this Court recognized the religious nature of a menorah and stated that "the display of a menorah alone might well have th[e] effect of impermissible endorsement." *Allegheny*, 109 S. Ct. at 3113 n.64.[5] As the Court of Appeals acknowledged, when a display is located in close proximity to core government buildings such as City Hall – the common "metaphor for government" – a message of governmental endorsement of religion is especially strong. *Kaplan*, 891 F.2d at 1028. Petitioners' App. at 11.[6]

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[3] Justice Kennedy in his *Allegheny* dissent noted that the location of a religious display on public property should not be controlling on its own. 109 S. Ct. at 3140.

[4] "The display of religious symbols in public areas of core government buildings runs a special risk of 'mak[ing] religion relevant, in reality or public perception, to status in the political community.' " *Allegheny*, 109 S. Ct. at 3119 (O'Connor, J., concurring).

[5] Justice Kennedy acknowledged that the permanent display of a religious symbol on a city hall would violate the establishment clause. *Allegheny*, 109 S. Ct. at 3137 (Kennedy, J., dissenting). Justice O'Connor suggested that a semi-permanent display of a religious symbol at the same location would be an endorsement. *Id.* at 3120 (O'Connor, J., concurring).

[6] Here there is evidence, absent from *Allegheny*, 109 S. Ct. at 3115 n.70, that Lubavitch sought to place its menorah in proximity to City Hall to gain some advantage from close association with government. Stipulation of Facts, Nos. 3A, 41B (c) & (d), 136 & 137; Plaintiffs' Exhibit E. The Petitioners argue

(Continued on following page)

Petitioners' contention that the judgement below is inconsistent with this Court's ruling in *Chabad v. City of Pittsburgh*, 110 S. Ct. 708 (1989), misinterprets the Court's entry order. As Chabad itself argued, the two cases are distinguishable since that case involved a menorah in a "combined holiday display."[7] That case was founded upon an allegation wholly absent from this one, that the City of Pittsburgh's refusal to display the menorah was in retaliation for Chabad's exercise of its right to petition the courts.[8] Moreover, no decision on the merits has been issued in that case. All appellate proceedings in *Chabad* reviewed only the district court's grant of a preliminary injunction.[9] The test before this Court was not whether the display violated the establishment clause, but rather

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that because Judaism is a minority faith, the religious symbols of which are not as secularized as Christian symbols of Christmas, even handed treatment requires the menorah's display. Petition at 11-12. Impliedly, the Petitioners thereby admit adoption of the Lubavitch's religious objectives. On this record the display of the menorah implicates Justice Kennedy's concerns with governmental involvement in proselytizing. *Id.* at 3139 (Kennedy, J., dissenting).

[7] Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, at 14 n.6, *Chabad v. City of Pittsburgh*, No. 89-2432 (W.D. Pa. Dec. 21, 1989) (expressly distinguishing *Kaplan*).

[8] Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, at 2, 4-8, *Chabad v. City of Pittsburgh*, No. 89-2432 (W.D. Pa. Dec. 21, 1989).

[9] Motion to Vacate "Temporary Stay" of Preliminary Injunction, *Chabad v. City of Pittsburgh*, 110 S. Ct. 708.

as Chabad argued, whether the order of the district court was an abuse of discretion.[10]

The Petitioners' assertion that the holding below "represents a radical reversal of established constitutional jurisprudence" regarding governmental regulation of a public forum is simply incorrect. Petition at 9-10. The court followed *Widmar* and *Allegheny* and found that a prohibition limited to displays of unattended, solitary religious symbols on property at a seat of government served a compelling interest of preventing government endorsement of religion and was narrowly tailored to serve that end. *Kaplan*, 891 F.2d at 1030. Petitioners' App. at 15-16.[11]

Finally, the Petitioners' argument that the court should have reached the opposite conclusion ignores the significant negative consequences which could result. A contrary decision might require placement of numerous

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[10] Motion to Vacate "Temporary Stay" of Preliminary Injunction, at 7, *Chabad*, 110 S. Ct. 708, citing *Keyes v. Denver School District*, 396 U.S. 1215, 1216 (1969) (Brennan, Circuit Justice) and *Brown v. Chote*, 411 U.S. 452, 457 (1973).

[11] Petitioners' further argument that the court's holding discriminates against minority faiths is also without merit. Minority faiths are not to be favored by government in order to achieve equality. *See Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) ("Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."). *See e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 578 (1987); *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 702 (1980).

religious displays on public property.[12] Religious strife could ensue as religious groups compete for access to public property. Governments might seek to close public forums rather than risk identification with religious symbols they find offensive, such as those of satanic cults. The public forum doctrine does not require that government surrender public parks to private interest groups for the purpose of erection of unattended, semi-permanent displays, especially when there are compelling countervailing governmental interests at stake, as in this case. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288.

II. The issues raised by this case are not of sufficient importance to warrant the Court's attention.

As noted in *Allegheny*, cases determining the constitutionality of a public display of religious symbols are usually fact specific to the particular context of the display. *Allegheny*, 109 S. Ct. at 3102-3103.[13] Here the Court

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[12] *But see Allegheny*, 109 S. Ct. at 3112 n.61. "The display of a menorah next to a creche on government property might prove to be invalid."

[13] Whether a display endorses religion "depends upon the message that the government's practice communicates . . . . That inquiry, of necessity, turns upon the context in which the contested object appears . . . . The concurrence thus emphasizes that the constitutionality of the creche in that case depended upon its 'particular physical setting,' and further observes: 'Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion.' " *Allegheny*, 109 S. Ct. at 3102. (Blackmun, J., referring to O'Connor, J., concurring in *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984)).

of Appeals applied *Allegheny* to a particular set of facts. Judge Feinberg's majority opinion clearly relied upon facts which demonstrate the singular, unattended nature of the menorah in question, its religious nature and purpose, its appearance "superimposed upon City Hall," the particular sign associated with it, the limited history of religious use of the park, the existence of controversy surrounding the display, the City's ineffective efforts to disclaim endorsement, and even the existence of other locations at which the display could have occurred. *Kaplan*, 891 F.2d at 1025-27, 1029-31. Petitioners' App. at 3-8, 14-16. Quite possibly, the court would have reached a different conclusion with a slightly different set of facts. The factual variations possible in this case are evident in that in November of 1988 the City approved the menorah for a different location in City Hall Park. *Kaplan*, 891 F.2d at 1026, n.3. Petitioners' App. at 7. Last year, after the Court of Appeals' December 12, 1989 decision, the City moved the menorah to still another location in the Park, adjacent to a decorated Christmas tree.

The fact sensitive nature of the Court of Appeals' decision is also demonstrated by the court's treatment of *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom. Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985). Contrary to Petitioners' contention, Petition at 8-9, the court did not assert that *McCreary* was overturned by *Allegheny*. Instead it distinguished *McCreary*, noting that "the park involved is not any city park but rather City Hall Park." *Kaplan*, at 1029. Petitioners' App. at 14.

This Court should hesitate to adjudicate every variant on the *Allegheny – Lynch* paradigm. The application of

this Court's rule to specific facts is a function for the lower courts.

Moreover, the issue Petitioners contend is presented – a sharp conflict between the establishment clause and the public forum doctrine – is a phantom. The court reconciled the application of both principles. It limited its holding to prohibiting the display of an unattended, solitary religious symbol at this location; transient, populated religious uses and nonreligious uses of the park continue unabated. *Kaplan*, 891 F.2d at 1030. Petitioners' App. at 16.[14] There is no inevitable collision here because neither principle is absolute. *See Bowen v. Kendrick*, 108 S. Ct. 2562, 2573 (1988) (incidental aid to religious organizations is permissible); and *Clark*, 468 U.S. 288 (reasonable time, place, and manner regulations that may limit expression are valid). This case does not present an issue that cries out for resolution by this Court.[15]

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[14] Moreover, the restrictions imposed minimally limit Lubavitch's use of the park. As noted above, *supra* p.4, other attractive locations for display of the menorah are available, and Lubavitch's right to transient, populated use of the park remains unrestricted. Conversely, the City's interest in avoiding claims that it is endorsing or otherwise supporting religion by maintaining a definitive separation of church and state is at least a legitimate end, if not a compelling one. *Widmar*, 454 U.S. at 288-289 (White, J., dissenting).

[15] The Petitioners' argument, Petition at 12, based on liability for Respondents' attorneys' fees is premature. No fee application has yet been filed. Therefore, no attorneys' fees award is a part of the record that Petitioners seek to have reviewed.

III. The issues raised by the Petition should be allowed to mature in the lower courts before review by this Court.

Petitioners also argue that this Court should grant certiorari to provide a clearer standard for the circuits. The previous Court decision concerning the public display of religious symbols, *Lynch v. Donnelly*, was decided more than five years before *Allegheny*. This Court decided *Allegheny* on July 3, 1989, less than eleven months ago, clarifying the previous standard with regard to the public display of religious symbols.[16] Since *Allegheny*, only three circuit courts have had the opportunity to apply the decision.[17] To date, there has been no conflict among the circuits in their interpretation of *Allegheny*.[18]

The district courts have just begun to apply *Allegheny*. Respondents' counsels' exhaustive search has revealed only one post *Allegheny* trial court decision

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[16] *Allegheny*, 109 S. Ct. at 3101 ("The rationale of the majority opinion in *Lynch* is none too clear").

[17] In addition to this case, *Allegheny* has been applied in *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), and *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990). *Allegheny* was also followed in a fourth case, *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989). (In a case not involving a public forum, the court found a genuine issue of fact as to whether a city seal bearing the likeness of a Mormon temple constituted an endorsement).

[18] *Smith* followed the Second Circuit's *Kaplan* holding, 895 F.2d at 960 n.8, while *Wilkinson* distinguished *Kaplan* on the facts. *Wilkinson*, 895 F.2d at 1102-03.

involving the public forum issue, *Doe v. Small*, 726 F. Supp. 713 (N.D. Ill. 1989), *appeal filed*, (No. 89-3756).[19]

Even if there were a need to extend the Court's *Lynch* and *Allegheny* line of decisions, the Court should allow the lower courts more time to interpret and apply its latest decision before reentering the field. As Justice Frankfurter stated some forty years ago, "[i]t may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., commenting on a denial of certiorari).

CONCLUSION

The Second Circuit Court of Appeals correctly applied the establishment clause test of *Allegheny* in a public forum context in light of *Widmar*. Its order protects the

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[19] *Doe v. Small*, involved a three-month long display in a city park of 16 larger than life-size paintings depicting the life of Jesus Christ. The court found that the public forum issue was not dispositive, holding that even if it were, *Widmar*, 454 U.S. 263, teaches that the city has a compelling interest in complying with the establishment clause. It held, citing *Allegheny*, that the display was unconstitutional. *Doe v. Small*, at 724.

Two other district court cases cite *Allegheny* outside of the public forum context. *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (Latin cross on town water tower held unconstitutional). *ACLU v. County of Delaware*, 726 F. Supp. 184 (S.D. Ohio 1989) (Nativity Scene on county courthouse lawn held unconstitutional).

compelling governmental interest in complying with the establishment clause by narrowly tailored restrictions on the display of unattended, solitary religious symbols at the seat of government, while leaving transient, populated religious speech unrestricted. Its opinion is closely tied to the particular context of this display. No sharp constitutional conflict is presented. Even if an appropriate issue for review were presented by this case, it should await further development in the lower courts.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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